LIBRARY
SUPREME COURT, U. S.

FEB 28 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 986

WHEATLAND HILLS CORP.,
a Delaware corporation,
Petitioner,

vs.

MARGARET F. MORTON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARION E. SIBLEY and
IRVING B. LEVENSON,
Attorneys for Respondent
SIBLEY, GIBLIN, LEVENSON & WARD
605 Lincoln Road
Miami Beach, Florida 33139

JOHN R. BARRETT and
MAURICE M. DILIBERTO
Additional Counsel of Record

R. L. Mimeographing, Inc., 906 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3090

INDEX

Preface 1

Florida Constitution, Statutes and Rules Involved 3

Statement of the Case 3

A) Factual Highlights of the Sarasota Divorce Litigation Between Margaret F. Morton and Richard Morton 3

B) Morton Family's Manipulation of Dade County Property During Pendency of Sarasota Litigation 15

C) This Case 19

Questions Presented 28

Argument 29

Conclusion 56

Certificate of Service 57

Appendix A1-A3

TABLE OF CASES

Armstrong v. *Armstrong*, 350 U.S. 568, 76 S. Ct. 629 30

Blair v. *United States*, 250 U.S. 273, 39 S. Ct. 468 43

Bloxham v. *Florida Cent. & P.R. Co.*, 35 Fla. 625, 17 So. 902 48

DeMarigny v. *DeMarigny*, 43 So. 2d 442 (Fla. 1949) 45

Estin v. *Estin*, 334 U.S. 541, 68 S. Ct. 1213 30

Folsom v. *Farmers Bank of Vero Beach*, 102 Fla. 899, 136 So. 524, 527 51

Frell v. *Frell*, 154 So. 2d 706 (Fla. App. 3rd, 1963) 50

Gaylord v. *Gaylord*, 45 So. 2d 507 (Fla. 1950) 45, 46

J. I. Kelley Co. v *Pollack & Bernheimer*, 57 Fla 459, 49 So. 934 48

Lake v. *Lake*, 103 So. 2d 639 (1958 Fla.) 55

Mabson v. *Mabson*, 104 Fla. 162, 140 So. 801 44
MacFadden v. *Muckerman*, 116 So. 2d 448, Fla. App. 3rd, 1959 44
Masilotti v. *Masilotti*, 158 Fla. 663, 29 So. 2d 872 44
Matsis v. *Matsis*, 155 Fla. 786, 21 So. 2d 545 44
Money v. *Powell*, 139 So. 2d 702, 703-704 (Fla. App. 2nd 1962) 51
Nash v. *Florida Industrial Commission*, ... U.S. ....., 88 S. Ct. 362 56
Neese v. *Southern Railway Company*, 350 U.S. 77, 76 S. Ct. 131 ..... 43, 44
Pennington v. *Fourth National Bank*, 243 U.S. 269, 37 S. Ct. 282 ..... 40, 41
Pennoyer v. *Neff*, 95 U.S. 714, 24 L. Ed. 565 ..37, 38, 39, 40, 41
Pollack v. *Pollack*, 159 Fla. 254, 31 So. 2d 253, 254 30
Tallentire v. *Burkhart*, 153 Fla. 278, 14 So. 2d 395 45
Vanderbilt v. *Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360 30
Voeller v. *Neilston Warehouse Co.*, 311 U.S. 531, 61 S. Ct. 376 ..... 43, 44
Webb v. *Webb*, 156 So. 2d 698 (Fla. App. 3rd, 1963) 31, 37, 41

OTHER AUTHORITIES

Constitution of the State of Florida, Article V, Section 4, Subsection 2 ..... 3, 27, 54
28 U.S.C., Section 1257(3) 53, 56
28 U.S.C., Section 2101(c) 53
Florida Statutes, 1961, Section 48.08 ..... 3, 5, 6
Florida Statutes, 1961, Section 48.09 ..... 3, 7
Forida Statutes, 1961, Section 48.10 ..... 3, 7
Florida Statutes, 1961, Section 48.13 ..... 3, 7
Supreme Court Rule 34(2) 53
Florida Appellate Rule 1.3 ..... 3, 27
15 Fla. Jur., *Fraudulent Conveyances*, Section 12, at pages 43-44 47

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 986

WHEATLAND HILLS CORP.,
a Delaware corporation,
Petitioner,

vs.

MARGARET F. MORTON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PREFACE

The case at bar involves the enforcement of a quasi in rem alimony decree rendered in 1963 by the Circuit Court

of the Twelfth Judicial Circuit, in and for Sarasota County, Florida, in that certain case therein lately pending styled *Margaret F. Morton* v. *Richard Morton,* bearing case No. 15,339 (Stipulated Exhibit E; R 322). That final decree was collaterally attacked in this case in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, by the petitioner, Wheatland Hills Corp., a Delaware corporation (R 28). The respondent, Margaret F. Morton, counter sued in this case for the enforcement of the previously rendered final decree (R 94-129).

The petitioner, in its zeal to capture the imagination of the Court for the purpose of causing a writ of certiorari to issue, culled the facts and turned them on a verbal lathe to create the appearance that this Court has jurisdiction and that the petitioner's constitutional right of due process of law had been violated. A full and complete presentation of the facts is necessary and will demonstrate the following:

A. That this Court does not have jurisdiction of this case because the petition was unseasonable and filed out of time;

B. That this case does not represent in any way a violation of the constitutionally guaranteed right to due process of law;

C. That the petitioner is not asserting a violation of its constitutional right to due process of law but rather someone else's; and

D. That a decision of the alleged constitutional question is not unavoidable in order for the state courts to have adjudicated this case.

Consequently the respondent shall undertake to present a full and complete statement of the factual and procedural background of this cause.

FLORIDA CONSTITUTION, STATUTES AND RULES INVOLVED

The following is a list of the Florida constitutional provision, statutes and an applicable rule of appellate procedure involved in this case, which are quite lengthy; thus their text is set forth in the appendix to this brief.

1. Article V, Section 4, entitled "Supreme Court", subsection (2), entitled "Jurisdiction", Constitution of the State of Florida.

2. Florida Appellate Rule 1.3 defining the term "Rendition."

3. Section 48.08, Florida Statutes, 1961, entitled "Notice of suit, form."

4. Section 48.09, Florida Statutes, 1961, entitled "Notice of suit, return day."

5. Section 48.10, Florida Statutes, 1961, entitled "Notice of suit, publication, proof and recording thereof."

6. Section 48.13, Florida Statutes, 1961, entitled "Notice of suit, mailing of."

STATEMENT OF THE CASE

A) Factual Highlights of the Sarasota Divorce Litigation Between Margaret F. Morton and Richard Morton

RICHARD and MARGARET MORTON, husband and wife for fifteen (15) years, the parents of two (2) boys, and long-time residents of Sarasota County, Florida, became embroiled in marital difficulties. Prior to the actual commencement of the marital litigation in the Sarasota Circuit Court, RICHARD MORTON abandoned his family and fled the jurisdiction of Florida to avoid personal service of

process. The entire record of the Sarasota Circuit Court divorce file, including the progress docket, were admitted in evidence at the trial of this case as Stipulated Exhibit "E" (R 322). A concise outline of what occurred in that case follows:

A. On April 23, 1962, the Sarasota marital litigation was begun by the filing of a bill of complaint by MARGARET F. MORTON against RICHARD MORTON. The record reflects the issuance of an original summons in chancery, as well as alias process returned unexecuted.

B. On July 9, 1962, an amended complaint was filed, notice of suit duly issued on the same day, and a copy of the notice furnished to the press for publication, and a copy of the notice together with the amended bill of complaint furnished by mail by the clerk to RICHARD MORTON in Mississippi. Such notice was duly published in the Sarasota Herald Tribune on July 11, 18, 25, and August 1, 1962.

C. On August 8, 1962, MARGARET F. MORTON filed a sworn petition for the issuance of a restraining order outlining, in detail, RICHARD MORTON's abandonment of his family and his fleeing the jurisdiction of Florida to avoid personal service of process in an attempt to frustrate the jurisdiction and power of the courts of Florida to make monetary provision for the support of his family. On that same date, the court issued an order prohibiting the transfer or concealment by RICHARD MORTON, or his agents, of any of his assets within the State of Florida.

D. The injunctive order of August 8, 1962, was duly served in person upon several members of the MORTON family, including RICHARD MORTON's brother, ALAN MORTON, and their uncle, EMIL MORTON, each of whom owns an interest in the MORTON TOWERS property.

EMIL MORTON is and was the member of the MORTON family who acts as agent for all other owners of the MORTON TOWERS property, with possession, custody and managerial control of that property (Stipulated Exhibit D; R 320).

E. On August 20, 1962, MARGARET F. MORTON filed a motion for leave to file a second amended complaint, which was granted on the same day, and, on that day, she filed her second amended complaint. In that second amended complaint, MARGARET F. MORTON alleged, under oath, that RICHARD MORTON owned real property situated in four (4) Florida counties, namely, Manatee, Sarasota, Dade and Broward. The complaint specifically describes, by lot, block, plat book and page number of the Public Records of Dade County, Florida, RICHARD MORTON's eight (8%) percent undivided title and ownership in the MORTON TOWERS property.

F. An affidavit of counsel for MARGARET F. MORTON filed on August 27, 1962, with registered mail, return receipts executed by RICHARD MORTON attached, establishes that RICHARD MORTON was furnished with a certified copy of the injunctive order of August 8, 1962, and a true and correct copy of the second amended complaint.

G. On September 20, 1962, an affidavit in support of service by publication was filed in strict compliance with the provisions of Florida Statutes, Chapter 48.08 (Appendix, p. A2), reflecting all of the statutory requisites, including RICHARD MORTON's residence at a specified place in Jackson, Mississippi.

H. On September 20, 1962, the clerk of the Sarasota Circuit Court duly issued a notice of suit, in strict compliance with the provisions of Florida Statutes, Chapter 48.08 (Appendix, p. A2), addressed to the defendant,

RICHARD MORTON, at his residence address in Jackson, Mississippi, notifying RICHARD MORTON of the filing of the second amended complaint and that the relief sought was an absolute divorce and alimony, and that the plaintiff was proceeding against specifically described property. Subsection 4, of Section 48.08, Florida Statutes (Appendix, p. A2), requires that the notice of suit shall set forth:

> *"The description of real property, if any, proceeded against."* (Emphasis supplied.)

That notice of suit specifically describes RICHARD MORTON's title and ownership in real property located in Sarasota County, Florida and in Dade County, Florida. It describes RICHARD MORTON's interest in the MORTON TOWERS real property in Dade County, Florida, as follows:

> "Lot 7 and the Southerly 1 foot of Lot 6 in Block 43 of Alton Beach Bay Front Subdivision, as per plat thereof, recorded in Plat Book 4 at page 125, public records of Dade County, Florida; said property lying and being in Dade County, Fla."

The notice of suit also specifically describes, as property being proceeded against, RICHARD MORTON's interest in the marital residence of the parties located in Sarasota County, Florida, as follows:

> "Lot 15 and Westerly 1/2 of Lot 16, a resubdivision of Block M, Sapphire Shores, as per Plat thereof recorded in the public records of Sarasota County, Florida; said property lying and being in Sarasota County, Florida."

Consequently, the notice of suit establishes, by specific description, that two (2) parcels of real property, located in Florida, in two (2) different counties, namely, Sarasota and Dade, were being proceeded against. The progress docket reflects that this notice of suit was made and filed on September 20, 1962, and was furnished that day to the press

for publication, and that the clerk mailed a copy of that notice, together with a copy of the second amended complaint, to RICHARD MORTON, in strict compliance with the provisions of Florida Statutes, Chapter 48.13 (Appendix, p. A3). The return day specified in the notice of suit was October 23, 1962.

I. On October 18, 1962, proof of publication that the mentioned notice of suit had been duly published was filed. That proof of publication strictly complied with the provisions of Florida Statutes, Chapter 48.10(2) (Appendix, p. A3). The proof of publication establishes that the notice of suit, which specified and described by lot, block, plat book and page of the public records of Dade County, Florida, RICHARD MORTON's title and ownership in the MORTON TOWERS property, together with a similar specification and description of the marital residence in Sarasota County, Florida, was published once each week for four (4) consecutive weeks in the Sarasota Herald Tribune, in strict compliance with the provisions of Florida Statutes, Chapter 48.10(1) (Appendix, p. A3). The dates of publication were September 21st and 28th and October 5th and 12th, 1962* The first publication took place on September 21, 1962, and the return day was October 23, 1962, and that afforded the defendant, RICHARD MORTON, thirty (30) days from the date of the first publication within which to appeal and defend by filing appropriate pleadings and was within the period of no less than twenty-eight (28) days and no more than sixty (60) days, provided for in Florida Statutes, Chapter 48.09 (Appendix, p. A2). Consequently constructive service of process regarding MARGA-

*NOTE: It will be demonstrated, on pages 15-19 of this brief, that RICHARD MORTON and his family, on October 4, 1962, fraudulently conveyed RICHARD's interest in the MORTON TOWERS' property to the petitioner, WHEATLAND HILLS CORP., in an effort to defeat the Sarasota Circuit Court's jurisdiction and thereby deprive Mrs. MORTON and her children of alimony and child support.

RET F. MORTON's second amended complaint, specifically describing RICHARD MORTON's title and ownership in the MORTON TOWERS property in Dade County, Florida, and the marital residence in Sarasota County, Florida, as the property proceeded against, was effectuated in strict, absolute compliance with the applicable and governing provisions of Florida Statutes, Chapter 48, regulating constructive service of process.

J. On August 29, *1963*, a decree pro confesso was entered against RICHARD MORTON stating, inter alia, as follows:

> "THIS CAUSE, coming on to be heard on this date upon Plaintiff's Motion for Decree Pro Confesso against the Defendant, RICHARD MORTON, and it appearing to the Court that the Defendant has been duly and regularly served by constructive service in accordance with the laws of the State of Florida and has failed to appear, answer, or move to dismiss the second amended bill of complaint herein or otherwise plead as required by the process of this Court up to and including the 29 day of August, 1963, it is ordered, adjudged and decreed that the second amended bill of complaint be taken as confessed."

K. On September 3, 1963, a petition was filed in the Sarasota County Circuit Court challenging, as fraudulent, the conveyance of RICHARD MORTON's interest in the MORTON TOWERS property, during the pendency of that litigation, to WHEATLAND HILLS CORP., a Delaware corporation, and the court entered an order finding that conveyance to be fraudulent upon the wife and that it in no way diminished the power of the court to award alimony, child support, suit money and attorneys' fees against RICHARD MORTON. The pertinent excerpts from the provisions of that order of September 3, 1963, read thusly:

"That that certain Warranty Deed dated October 4, 1962 purportedly conveying Defendant Richard Morton's undivided 8% interest in certain realty in Dade County, Florida to Wheatland Hills Corp., a Delaware corporation, was fraudulent as to the Plaintiff and was made in bad faith and, further, was in contempt of and in contravention of this Court's Temporary Restraining Order of August 8, 1962. . . .

Inasmuch, therefore, that this Court has found that the said deed of October 4, 1962 is fraudulent, this Court shall not consider the property so conveyed as in any way diminishing the estate of the Defendant for the purposes of assessing alimony and support, court costs and attorneys' fees, the Court concluding that equity should not permit the Defendant to benefit by his fraud.

IT IS FURTHER ORDERED AND DECREED that subject only to the rights of Wheatland Hills Corp., if any, in and to the property described in the aforesaid Warranty Deed, the Defendant's interest in and to the property hereinbelow described shall be subject to a prior and continuing lien of the Plaintiff for alimony and support, court costs and attorneys' fees. The property contained in the said Warranty Deed is described as follows, to wit:

Lot 7, plus the Southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4, at Page 125, of the Public Records of Dade County, Florida.

IT IS FURTHER ORDERED AND DECREED that the aforedescribed interest of Richard Morton in and to the aforedescribed property be and the same is held as security for such further orders and decrees as shall be entered by this Court.

DONE AND ORDERED in Chambers at Sarasota, Florida, this 3 day of September, 1963.

/s/ John D. Justice
Circuit Judge"

L. On September 4, 1963, a final decree of divorce was rendered. In that decree, the court referred the financial aspects of the case to a special master in chancery, and reserved jurisdiction for the entry of a supplemental final decree.

M. On September 9, 1963, the special master's report was filed, the pertinent factual findings of which read as follows:

> "I find that the net worth of the defendant, RICHARD MORTON, is in excess of Two Million, Five Hundred Thousand Dollars ($2,500,000.00). The standard of living established by the defendant for the plaintiff during their fourteen (14) years of marriage was in excess of Sixty Thousand Dollars ($60,000.00) per year for personal and domestic expenses. This is exclusive of such items as cars and maintenance thereof, maintenance of home and grounds, vacations, travel and other fringe expenditures which were paid for from defendant's corporate sources. That the defendant owns an eight percent (8%) undivided interest in that certain complex of real and personal property located in Dade County, Florida known as Morton Towers. Morton Towers is valued at Twenty-five Million Dollars ($25,000,000.00), at present fair market value.
>
> 2) I find, further, that defendant's ownership of such eight percent (8%) interest returns an annual net income, after operating expenses but before debt cost, of in excess of Two Hundred Forty-Five Thousand Dollars ($245,000.00)."

N. On September 9, 1963, upon the filing of the special master's report, a supplemental final decree was entered in words and figures, as follows:

> "This cause coming on to be heard before me for final hearing upon Plaintiff's bill of complaint and the Decree Pro Confesso heretofore entered herein, and the Court having considered carefully the evidence and testimony submitted and adduced in the trial of this

cause, finds that the equities are decidedly with the Plaintiff wife and that she is entitled to the relief accorded by this decree, and whereas this Court has by its decree entered September 4, 1963, ordered, adjudged and decreed as follows:

1) That this Court has jurisdiction of this cause, the subject matter hereof, the persons of the Plaintiff and the two minor children of the parties hereto and the property of the Defendant described in the complaint and lis pendens herein, and all property of the Defendant situate in the State of Florida.

2) That the Defendant, Richard Morton, has been duly and regularly served with constructive service in this cause, and has actual notice of this cause.

3) That the Plaintiff, Margaret Morton, by competent evidence has sustained the allegations of her complaint and that the equities of said cause are with the Plaintiff and she is hereby granted a decree of divorce, a vinculo matrimonii, from the Defendant, and the bonds of matrimony heretofore existing between Margaret Morton and Richard Morton be forever dissolved.

4) That the care, custody and control of the minor children of the parties, BRUCE MORTON, age 14, and GREGG MORTON, age 12, is awarded unto the Plaintiff, Margaret Morton.

5) That this Court finds upon a full consideration of the evidence, testimony and pleadings herein, that the Plaintiff is entitled to permanent lump sum alimony, permanent child support, permanent attorneys' fees and suit costs, and this Court reserves jurisdiction of this cause to determine the specific amounts thereof; further, this cause is hereby referred to a Special Master in Chancery for the purpose of taking testimony and evidence in support of Plaintiff's claim therefor and to make his findings of fact, conclusions of law and recommendations in respect thereof to this Court with all convenient speed.

6) That this Court reserves jurisdiction of this cause for the purpose of enforcing the terms and conditions of this Decree and entering such orders herein as may be necessary.

And the Court having appointed a Special Master in Chancery for the purpose of taking testimony and making findings of fact, conclusions of law and recommendations with respect to lump sum permanent alimony, child support, attorneys' fees and Court costs, and said Special Master having filed his Special Master's Report before the Court, it is in consideration thereof, thereupon

ORDERED, ADJUDGED AND DECREED as follows:

1) That the plaintiff, Margaret Morton, is hereby awarded permanent lump sum alimony and child support in the sum of FOUR HUNDRED FIFTY THOUSAND DOLLARS ($450,000.00), payable within ten (10) years in equal annual payments, which sum shall constitute a special equitable lien against the defendant Richard Morton's interests in the following described realty:

Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;

TOGETHER with all other real and personal property of the Defendant of whatsoever nature located within the State of Florida; that the foregoing lump sum award shall be allocated one-half (1/2) for the wife's alimony and one-half (1/2) for support of the minor children of the parties; that defendant's share in the mortgage debt on the above described property, and other obligations of the Defendant were fully considered by this Court in making the foregoing determination of alimony and support; that the lump sum award in para-

graph 1 hereof shall be payable in the sum of FORTY FIVE THOUSAND DOLLARS ($45,000.00) per annum, commencing September 9, 1963, and a like sum of FORTY FIVE THOUSAND DOLLARS ($45,000.00) on each successive 9th day of September hereafter until paid in full.

2) That the Plaintiff, Margaret Morton, is hereby awarded the residence property, together with the furniture and furnishings therein contained, located at 350 South Shore Drive, Sarasota, Florida, legally described as:

> Lot 15 and the westerly one-half (1/2) of Lot 16, a Re-subdivision of Block 'M', SAPPHIRE SHORES, as per plat thereon recorded in the Public Records of Sarasota County, Florida;

and this Decree shall be taken and considered in all courts of law or equity to have the same operation and effect as if a deed of conveyance had been executed by the Defendant, Richard Morton, who shall be conclusively deemed to have no interest whatsoever in said property, and the Plaintiff, Margaret Morton, shall be conclusively deemed to be the fee simple owner of said property. The equities of the parties therein have been fully computed and fully considered by the Court in making his deliberation and award.

3) That the Plaintiff is hereby awarded attorneys' fees in the sum of FORTY FIVE THOUSAND DOLLARS ($45,000.00) for her attorneys of record in this cause. The foregoing sum shall be a lien upon the Defendant Richard Morton's interest in the property described in paragraph 1 of this Decree.

4) That the Plaintiff is hereby awarded court costs and expert witness fees in the sum of SEVEN THOUSAND SIX HUNDRED DOLLARS ($7,600.00), which sum shall be a lien upon the Defendant Richard Morton's interest in the property described in paragraph 1 of this Decree.

5) That the Special Master's Report heretofore filed herein is hereby adopted, ratified and approved in every respect save and except the recommendations therein which are modified in accordance with this Decree.

6) That the Plaintiff is awarded the sum of FORTY SIX THOUSAND ONE HUNDRED NINETY NINE and 87/100 DOLLARS ($46,199.87), representing arrearages to date in unpaid temporary alimony, child support, attorneys' fees and Court costs, entered by this Court on November 9, 1962, which said sum shall be a lien upon Defendant Richard Morton's interest in the property described in Paragraph 1 of this Decree.

7) That all of the sums awarded and directed to be paid herein shall constitute a lien against Defendant's interest in the property described as:

> Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;

together with all other property of the Defendant located within the State of Florida and said property is hereby impressed with a lien for such purposes and to ensure the payment of the sums herein ordered to be paid, and said lien is hereby decreed to be a lien upon the assets of Defendant located within the State of Florida, for which let execution issue forthwith in accordance with this Decree.

8) That this Court reserves jurisdiction of this cause for the purpose of enforcing the terms and conditions of this Decree and entering such orders herein as may be necessary.

DONE AND ORDERED in Chambers at Sarasota, Sarasota County, Florida, this 9 day of September, 1963.

/s/ John D. Justice
CIRCUIT JUDGE"

O) NO APPEAL was ever taken from any of the orders or the final decree entered in the Sarasota County Circuit court divorce litigation.

B) Morton Family's Manipulation of Dade County Property During Pendency of Sarasota Litigation

While the Sarasota marital litigation was pending, the Morton dynasty, as one of its senior members, Mr. Sidney Newman testified, at the trial of this cause (R 337-345), upon receipt of the notice that RICHARD MORTON's wife and children sought to subject and were proceeding against RICHARD MORTON's interest in the family's TWENTY-FIVE MILLION ($25,000,000.00) DOLLAR MORTON TOWERS project in order to satisfy their bona fide claim for alimony and child support, closed ranks and organized and devised a corporate scheme in an attempt to divest the Sarasota Circuit Court of jurisdiction and deprive RICHARD MORTON's wife and children of the relief to which they were entitled. Here is what happened and how WHEATLAND HILLS CORP., the petitioner in this proceeding, got interjected into this matter:.

A. Subsequent to the entry of the temporary restraining order of August 8, 1962, prohibiting RICHARD MORTON or his agents from transferring any of his property and after the first publication of the notice of suit on September 21, 1962, which specifically described RICHARD MORTON's interest in the MORTON TOWERS property, as property being proceeded against for the claim of alimony, child support, attorneys' fees and court costs,

the MORTON family, on October 3, 1962, caused to be organized and created, under and by virtue of the laws of the State of Delaware, the corporation called WHEATLAND HILLS CORP. (R 193-197; Stipulated Facts, Paragraph VI).

B. On October 4, 1962, LAWRENCE MORTON, the father of RICHARD MORTON, pursuant to a power of attorney given to LAWRENCE MORTON on December 28, 1959, by his three (3) sons (RICHARD, ALAN and JAMES MORTON), conveyed RICHARD MORTON's eight (8%) percent title and ownership in the MORTON TOWERS property to WHEATLAND HILLS CORP., a Delaware corporation, organized and created the day before. That deed (Def. Ex. 1; R 328) was recorded among the Public Records of Dade County, Florida, on the following day, namely, October 5, 1962, in Official Records Book 3353, at Page 320. Prior to that, there had been spread upon the public records of Dade County, Florida, a red flag in the form of a revocation of LAWRENCE MORTON's power of attorney by MARGARET MORTON. The revocation dated September 13, 1962, was filed and recorded among the Public Records of Dade County, Florida, on September 14, 1962 (Stipulated Exhibit G; R 326). That revocation of the power of attorney, which was thereafter purportedly exercised by LAWRENCE MORTON to perpetrate a fraud upon MARGARET MORTON, was additional notice above and beyond the notice that the MORTON family had previously and admittedly received, which would have forestalled and precluded any bona fide purchaser from taking title.

C. The Stipulated Facts (R 193-197) further establish that the corporate device, in the form of WHEATLAND HILLS CORP., a Delaware corporation, was an illusory transaction. Admittedly, WHEATLAND HILLS CORP.

paid nothing for the land it purportedly received on October 4, 1962, which was under seizure at that time in the Sarasota divorce suit. RICHARD MORTON merely converted his title and ownership in the seized property in Florida for stock in a foreign corporation. Moreover, the answers to interrogatories by THE CHASE MANHATTAN BANK (Def. Ex. 5; R 333 and 187-190), establishes that the corporate shell of WHEATLAND HILLS CORP. in no way affected RICHARD MORTON's title and ownership to eight (8%) percent of the MORTON TOWERS property, because he was permitted by THE CHASE MANHATTAN BANK, on December 17, 1962, to increase his personal loan by SIXTY-FIVE THOUSAND EIGHT HUNDRED SIX & 50/100THS ($65,806.50) DOLLARS and has, thereafter, had the benefit of the rents and profits from the MORTON TOWERS property applied in payment of that personal debt. Initially, RICHARD MORTON borrowed THREE HUNDRED TWENTY-FIVE THOUSAND ($325,000.00) DOLLARS from THE CHASE MANHATTAN BANK in order to repay his father the money that was advanced for his (RICHARD MORTON's) interest in the MORTON TOWERS property, and he assigned to that bank all of the income, rents and profits accruing from his proportionate title and ownership in the said property (R 193-197, Stipulated Facts, Paragraph IV). Additionally, the managerial possession and control of the property by EMIL MORTON has similarly remained totally unchanged by the WHEATLAND HILLS transaction. Moreover, certain Circuit Court files were admitted in evidence as Defendant's Exhibits 3 and 4 (R 332), which establish that, in 1963, RICHARD MORTON, with the other members of the MORTON dynasty, filed suit in their own names, as the owners of the fee simple title to the MORTON TOWERS property, against the taxing authori-

ties of Dade County, Florida, seeking a reduction in the assessment on the MORTON TOWERS property. Mr. Sidney Newman attributed that suit to "stupidity" (R 343), but it was, in fact, candor, because the lawyer who brought that suit knew of the existence of WHEATLAND HILLS CORP., because the other suit, brought by the same lawyer that Newman called stupid, was concluded less than a month before the tax suit was brought, and that earlier case mentions WHEATLAND HILLS CORP. It was apparent that the MORTON dynasty castigated as stupid, a truthful revelation of the genuine status of the title to the MORTON TOWERS property, showing that RICHARD MORTON still maintained his direct title and interest in the land, because it reveals the scheme to deprive MARGARET F. MORTON and her children of their just entitlement. At the conclusion of the final hearing in this cause, the chancellor below made the following observation (SR 32-33):

> ". . . Mr. Newman, as the witness very frankly stated that when they saw the red light flashing down in Florida that something was about to happen, they did not want anything to happen to this development and so they immediately took steps to try to see that nothing would happen to it."

The chancellor's observation, based on the facts in evidence, cryptically summarizes the truth and entirely eliminates any question as to the bona fides of the conveyance to WHEATLAND HILLS CORP.

Briefly summarized, the pertinent facts of this case establish, absent contradiction, that after the Sarasota Circuit Court duly exercised its jurisdiction by the entry of an injunctive order prohibiting the transfer of any of RICHARD MORTON's property in Florida, by himself or his agents, and seized his property in Florida by authorized

legal process that was duly issued and published, notifying RICHARD MORTON and his family that his eight (8%) percent title and ownership in the MORTON TOWERS property was being proceeded against in order to satisfy the claim of his wife and children for alimony, child support, suit money and attorneys' fees, the property was conveyed with notice and without valuable consideration to a dummy corporation (the Petitioner); so that RICHARD MORTON might continue to enjoy all of the benefits of ownership, purportedly defeat the jurisdiction of the courts of Florida, and escape the burden of meeting his just obligation to his wife and children.

C) This Case

As stated at the outset, in the preface to this brief, Wheatland Hills Corp. instituted this litigation to collaterally attack the final decree of divorce that had been rendered in the Sarasota divorce litigation between Richard and Margaret Morton. Margaret Morton counterclaimed in this case for the enforcement of the monetary provisions of the previously rendered final decree.

After a full final hearing in this cause, the chancellor rendered a final decree in which it was found that the Sarasota Circuit Court had subject matter jurisdiction of the Morton divorce litigation as well as the power to declare an equitable lien upon Richard Morton's title and ownership in the Morton Towers property located in Dade County, Florida. The final decree found that Richard Morton had been duly served by publication "as required by law" and that the order of publication specifically described the Morton Towers property in Dade County, Florida, as property being proceeded against for the purpose of charging it for support and alimony for his wife and children. The full text of that decree, excluding the introductory paragraph, reads as follows (R 413-420):

"Richard and Margaret Morton, husband and wife for fifteen years, the parents of two minor boys, and residents of Sarasota County, Florida, became involved in domestic relations proceedings. Margaret filed a suit against Richard on April 23, 1962, in the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida, which court had jurisdiction over the marital status. Richard fled the jurisdiction of the Florida courts and was never personally served with process in the divorce suit. In said cause Margaret filed a second amended complaint, seeking thereby, among other things, in addition to a divorce and custody of the children, a decree charging in equity Richard's title and ownership in the Morton Towers property located in Dade County, Florida, for the payment of alimony and support for her and the children. The legal description of said property is as follows:

> Lot 7 and the Southerly 1 foot of Lot 6 in Block 43 of Alton Beach Bay Front Subdivision, as per plat thereof, recorded in Plat Book 4, at page 125, public records of Dade County, Florida; said property lying and being in Dade County, Fla.

Richard was served by publication as required by law and the order of publication specifically described the above property and gave Richard notice that Margaret's suit sought a decree charging it for support and alimony for herself and the children. A decree pro confesso having been rendered against Richard predicated upon said service, thereafter on September 9, 1963, a final decree was rendered, which, among other things, provided:

> 'ORDERED, ADJUDGED AND DECREED as follows:
>
> 1) That the plaintiff, Margaret Morton, is hereby awarded permanent lump sum alimony and child support in the sum of FOUR HUNDRED FIFTY THOUSAND DOLLARS ($450,000.00), payable within ten (10) years equal annual payments, which

sum shall constitute a special equitable lien against the defendant Richard Morton's interests in the following described realty:

> Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida;
> * * *

7) That all of the sums awarded and directed to be paid herein shall constitute a lien against defendant's interest in the property described as:

> Lot 7, plus the southerly 1.0 foot of Lot 6, Block 43, Alton Beach Bayfront Subdivision, according to the plat thereof recorded in Plat Book 4 at page 125, Public Records of Dade County, Florida, otherwise known and described as Morton Towers, Maimi Beach, Florida;
> * * *'

At the time the order of publication was rendered, and at the time Richard received actual notice of the filing of the Second Amended Complaint, he was the owner of an undivided eight per cent (8%) interest in the property above described. Thereafter, on October 4, 1962, Richard's father, Lawrence Morton, then and there holding a power of attorney from his son, conveyed Richard's interest and title in the above property to the plaintiff Wheatland Hills Corp. The testimony indicates that this conveyance was made in order to protect the property from the effect of Margaret's suit and was prompted by the order of publication of the court in which notice was given that said property was being proceeded against.

The plaintiff, Wheatland Hills Corp., brought suit in the Eleventh Judicial Circuit in and for Dade County, Florida, seeking to quiet title to the property

described in the final decree rendered as aforesaid, and sought to have this court strike it as a cloud on the plaintiff's title. Margaret, party defendant, answered and filed her cross-suit in which she seeks foreclosure of an equitable lien imposed upon said property by the final decree.

Wheatland Hills Corp. is a corporation organized and existing under the laws of the State of Delaware. Its three stockholders are Richard and his two brothers, each of whom owns an 8% interest in the real estate above described, and their interest in said real estate was conveyed to the plaintiff in exchange for all of its outstanding capital stock, one-third being issued to each of the sons. This was the only consideration given for the conveyance of the property.

An absconding father and husband, who avoids personal service by fleeing the jurisdiction of the courts of this State, leaving behind real property within the jurisdiction of this State, may thus escape personal liability for the payment of support and alimony to the deserted wife and children. Not so the property within the State; it remains subject to the processes of our courts and may be seized and sold to provide support for the abandoned wife and children.

The fleeing husband does not escape with his real property by the simple device of forming a corporation, after leaving the State, to which he conveys the title in exchange for the capital stock of the corporation. The courts of this State and their processes are not impotent in the face of this mockery. It is obvious that the courts of this State have the power to appropriate the absent husband's property to the payment of his obligation for the support of his wife and children, provided proper procedures are adopted to accomplish this end.

In *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L.Ed. 565, it is pointed out by the Supreme Court of the United

States, in speaking of the power of state courts, that 'it is a legitimate just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens', and this may be accomplished by substituted service by publication 'where the property is once brought under control of the court by seizure or some equivalent act'.

Service by publication was accomplished in this cause and notice of the proceedings was received by Richard and the order requiring him to appear *specifically described the property against which Margaret was proceeding in said divorce suit,* giving to Richard full notice that it was the purpose of the suit to appropriate this property to the satisfaction and payment of the claims due her and her children for support.

Again, in *Reed* v. *Reed,* 121 Ohio St. 188, 167 N.E. 684, it was pointed out that the husband was a non-resident over whom the court did not obtain jurisdiction. However, the court held that since the complaint and the published notice to the defendant husband contained a particular description of the land sought to be appropriated, such notice was equal to a sequestration of the land.

The amount awarded to Margaret, and the creation of a lien upon the property for the payment of the award, are matters which are finally concluded in the proceedings in the Twelfth Judicial Circuit. This Court is bound by those adjudications.

The Court being duly advised in the premises, it is

ORDERED, ADJUDGED AND DECREED as follows:

(a) That the equity of this cause is with the defendant and cross-claimant, Margaret Morton, and is against the plaintiff and cross-defendants, Wheatland Hills Corp., Richard Morton and Emil Morton.

(b) The Court finds and declares that Margaret Morton has a valid and subsisting equitable lien upon the following described property:

Lot 7 and the Southerly 1 foot of Lot 6 in Block 43 of Alton Beach Bay Front Subdivision, as per plat thereof, recorded in Plat Book 4, at page 125, public records of Dade County, Florida, otherwise known and described as Morton Towers, Miami Beach, Florida,

for the total sum of $548,799.87, composed of the following items:

$450,000.00 awarded as permanent lump sum alimony and child support, payable within ten years in equal annual installments from September 9, 1963, of which $135,000.00 is past due, together with

$46,199.87, consisting of temporary arrearages, and
$45,000.00 attorneys' fees, and
$7,600.00 expert witnesses' fees,

making a total indebtedness past due of $233,799.87, and that the total sum of $548,799.87 constitutes and is a lien upon Richard Morton's 8% undivided interest in the above described property. This equitable lien in favor of Margaret Morton is subject to that certain assignment of rents and profits dated April 20, 1962, from Richard Morton to The Chase Manhattan Bank, and any sale provided for herein shall be subject to the rights of The Chase Manhattan Bank.

(c) The cross-defendant, Richard Morton, shall pay to the defendant and cross-claimant, Margaret Morton, forthwith, the amounts hereinabove recited as due, together with interest thereon from September 9, 1963 until paid, together with all costs of this suit taxed by the Clerk of this Court, Sheriff's fees, costs of publication, Special Master's fees, and all other costs of these proceedings.

(d) In default of said payment being made as hereinabove ordered, then the said undivided 8% interest in the above described property lying and being in Dade County, Florida, be sold at public auction for cash to the highest and best bidder at the south door of the County Courthouse in the City of Miami, Dade County, Florida, to satisfy this decree. Honorable Jack Abbott, Esquire, be and he is hereby designated and appointed as a Special Master of this Court to make and conduct said sale on a legal sale day during the legal hours of sale after first giving public notice of sale, time and place thereof, and causing said notice to be published once a week for four consecutive weeks in The Miami Review, a newspaper of general circulation published in Dade County, Florida, and he is hereby authorized and directed to execute and carry into effect this decree.

(e) Out of the proceeds arising from the sale of the property herein ordered to be sold, the Master shall retain his fee and shall pay to the officials of the Court their costs herein, and shall pay to the attorneys for the cross-claimant, Margaret Morton, any attorneys' fees that may be hereinafter allowed in this cause; out of the remainder of said proceeds, as far as the same shall apply, there shall be paid to the cross-claimant, Margaret Morton, the sum of $233,799.87, with interest thereon from September 9, 1963 to the date of sale. If said property shall sell for more than enough to pay the cross-claimant the aforesaid sum now due to her with interest thereon, said Master shall report said overplus to this Court for this Court's order and the same shall thereupon be deposited in the Registry of the Clerk of this Court to be held as security for the balance due the cross-claimant, Margaret Morton, as hereinabove adjudicated.

(f) The plaintiff, Wheatland Hills Corp., and cross-defendants, Richard Morton and Emil Morton, and all persons claiming by, through or under them since the commencement of this suit, shall be forever barred and foreclosed of any and all right, equity of

redemption, claim, estate, or title in and to the above described property.

(g) Upon the execution and delivery of the Master's Deed to the purchaser at said sale, or his or its heirs, representatives, successors or assigns, he, it or they shall, without delay, be let into possession of the said premises so conveyed.

(h) The cross-claimant, Margaret Morton, shall be permitted to bid at the said Master's sale the total amount of the award made to her and in the event she is the successful bidder, she shall only be required to pay the costs of court and Master's fee, the balance to be credited against the amount due or awarded to her as above set forth.

(i) The Court retains jurisdiction of this cause to render such orders and decrees as may be necessary to enforce the terms and conditions of this Corrective Final Decree.

DONE AND ORDERED in Chambers, at the Dade County Courthouse, Miami, Florida, this 19 day of April, 1966.

/s/ William A. Herin
CIRCUIT JUDGE"

A timely appeal was duly instituted and perfected in the District Court of Appeal, in and for the Third District of Florida. On May 9, 1967, the decision sought to be reviewed in this proceeding was entered and filed. The short per curiam opinion of the District Court of Appeal reads as follows (R 438):

"PER CURIAM.

The Circuit Court for Sarasota County had the power to place an equitable lien upon property located in Dade County which property belonged to a non-resident and was specifically described in publication of notice as property being proceeded against in a divorce suit in order to be subjected to the satisfaction of the claim for alimony and child support. Having been

shown no reversible error, the decree appealed is affirmed. State of Florida v. Jacksonville P. & M. R. R. Co., 16 Fla. 708, 722 (1878); Klausner v. Ader, Fla. App. 1963, 156 So. 2d 193; Webb v. Webb, Fla. App. 1963, 156 So. 2d 698; Wesner v. O'Brien, 56 Kan. 724, 44 P. 1090 (1896); Benner v. Benner, 63 Ohio St. 220, 58 N.E. 569 (1900); Reed v. Reed, 121 Ohio St. 188, 167 N.E. 684. See Wagner v. Wagner, 293 F. 2d 533, 538 note 5 (D.C. Cir. 1961); Annotations 10 A.L.R. 3d 212.

Affirmed."

Pursuant to the definition of the term "Rendition" contained in Florida Appellate Rule 1.3 (Appendix, p. A1), the decision sought to be reviewed became final on June 13, 1967. On that date the timely petition for rehearing that had been filed was denied and the mandate issued (R 439). The period of ninety days from the date of the rendition of the decision sought to be reviewed expired on Monday, September 11, 1967. The petition for a writ of certiorari was not filed in this cause in the Supreme Court of the United States until January 3, 1968.

In the interim (between the time the decision sought to be reviewed became final and the petition for a writ of certiorari was filed in this Court) the petitioner sought review in the Florida Supreme Court by the filing of a petition for a writ of certiorari. The Florida Supreme Court did not have jurisdiction of this case pursuant to the grant of jurisdiction contained in Article V, Section 4(2) of the Florida Constitution (Appendix, p. A1). The Florida Supreme Court so stated in its order denying the petitioner's application for a writ of certiorari (R 451). Consequently the highest court in the State of Florida empowered to render a decision in this case was the District Court of Appeal, in and for the Third District. That Court rendered its decision which is sought to be reviewed and that decision became final more than ninety days prior to the institution of this proceeding.

QUESTION PRESENTED

Petitioner, in the "Question Presented" section of its brief (pp. 2-3) has predicated the issue on the following mistaken conclusions:

(1) That there was no seizure or sequestration of Richard Morton's property located in Florida prior to the entry of the quasi in rem alimony and child support decree.

(2) That the process was legally inadequate.

Additionally as underlying assumptions the petitioner has overlooked the following:

(3) That Wheatland Hills Corp., a Delaware corporation, adjudicated to be a fraudulent device concocted by Richard Morton and his family, has no standing to assert an alleged violation of Richard Morton's constitutional right to due process of law.

(4) That there has been no denial of due process of law because the alimony proceeding in Florida was quasi in rem, and no attempt has ever been made to impose any personal obligation upon Richard Morton. His property in Florida has been seized by legal process to satisfy his wife's and children's claims for alimony, child support, suit money and attorney's fees. The state courts have not attempted to exercise any jurisdiction beyond the extent of Richard Morton's property in Florida.

These mistaken assumptions, indulged in by the petitioner, make it impossible for the respondent to accept the petitioner's statement of the issue. The respondent earnestly believes that the issues may be accurately phrased in accordance with the record as follows:

(a) Whether or not Richard Morton was denied due process of law by virtue of the rendition of a final decree of divorce against him providing for the payment of alimony, child support, suit money and attorney's fees which was founded upon constructive service of process but which did not attempt to impose a personal obligation upon him and constituted an exercise of jurisdiction solely to the extent of property located in the State of Florida which had been seized by due and lawful process?

(b) Whether or not Wheatland Hills Corp. can assert an alleged violation of Richard Morton's constitutional right to due process of law?

(c) Whether or not a decision of the alleged constitutional issue was necessary and unavoidable to a determination of the rights of the parties to this litigation?

(d) Whether or not this Court has jurisdiction, since the petition for a writ of certiorari was filed out of season and was untimely by virtue of the elapse of 204 days between the date of the finality of the decision sought to be reviewed and the filing of the petition in this cause?

ARGUMENT

A) Richard Morton Was Not Denied Due Process of Law by Virtue of the Rendition of a Final Decree of Divorce Against Him Providing for the Payment of Alimony, Child Support, Suit Money and Attorney's Fees Founded upon Constructive Service of Process But Which Did Not Impose Any Personal Obligation upon Him and Constituted an Exercise of State Jurisdiction Solely to the Extent of His Property Located in the State of Florida Which Had Been Seized by Due and Lawful Process

Under settled constitutional concepts, in marital litigation, a domiciliary state has the power, upon constructive

service of process, to terminate the marital statuus and if that state is the domicile of the wife and the husband has property in the state, the state has the added power to apply the husband's property to the satisfaction of the claim for alimony and child support in order to prevent an abandoned spouse and children from being left impoverished and becoming a public charge. See: *Estin* v. *Estin,* 334 U.S. 541, 68 S. Ct. 1213; *Armstrong* v. *Armstrong,* 350 U.S. 568, 76 S. Ct. 629; *Vanderbilt* v. *Vanderbilt,* 354 U.S. 416, 77 S. Ct. 1360.

Proper perspective requires that it be noted that civilized society requires of a husband and father that measure known as alimony and child support for the maintenance, upkeep and preservation of his family. This principle is embossed in the law of Florida by the opinion of Justice Terrell in *Pollack* v. *Pollack,* 159 Fla. 254, 31 So. 2d 253, 254, where, speaking for the Florida Supreme Court, he wrote:

> "Appellant fails to take account of the well-settled principle that the law imposes on civilized man the duty to provide food, shelter and raiment for his own. It was one of the conditions upon which Adam was bounced out of the garden, and it has been the law ever since. Courts of equity have inherent jurisdiction to protect infants. *Fisher* v. *Guidy,* 106 Fla. 94, 142 So. 818. They are wards of the Court and when the Chancellor is concerned with their bread and butter, he does not take his cue from Elijah and the ravens, he draws it from the earnings of the father. . . ."

Richard Morton is an immensely wealthy man. His wife and his children have gone without since he abandoned them in April 1962. Their food, shelter and clothing should be drawn from him, and that is precisely what the Sarasota Circuit Court did. The jurisdictional argu-

ment, based on an alleged denial of Richard Morton's constitutional right to due process of law, is asserted in this litigation by Wheatland Hills Corp., a Delaware corporation, the corporate device created by Richard Morton and the Morton dynasty, to deprive Richard Morton's wife and children of their just due. The argument made by that instrumentality in this Court is that there was no legally recognized seizure of Richard Morton's title and ownership in the Morton Towers property prior to the conveyance to Wheatland Hills Corp. The Courts of Florida have determined that a duly issued notice of suit that specifically describes real property located in the State of Florida is tantamount to and the equivalent of an equitable sequestration. The decision which established that as the law of Florida is *Webb* v. *Webb*, 156 So. 2d 698 (Fla. App. 3rd, 1963). The analysis of that question was made by Justice Barnes, and since the writers of this brief cannot improve upon that exposition of the law, the opinion is quoted in full, as follows (156 So. 2d at 700-703):

> "*Jurisdiction on constructive service in suit against non-resident for divorce or alimony to reach his property within the state.*
>
> As Mr. Justice Field stated in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, 'Every state owes protection to its own citizens; and when non-residents deal with them, it is a legitimate just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into the non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property;', and the decision further held that when the court did not acquire jurisdiction

over the person of the defendant-owner that 'the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property', and 'that substituted services by publication, or any other authorized form, may be sufficient to inform the parties of the object of the proceedings taken where property is once brought under control of the court by seizure or some equivalent act.' The property must be proceeded against or subjected to the process of the court *in limine*.

In Pennington v. Fourth National Bank, 243 U.S. 269, 37 S.Ct. 282, 283, 61 L.Ed. 713, it was held that an injunction restraining a bank [joined as a defendant] from paying out any part of a deposit standing in the name of the husband was as effective as a seizure to make the action one quasi in rem, where the complaint sought a divorce and alimony and the non-resident husband was not served within the state and did not appear; and that it was 'immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court'.

The foregoing Pennington case was a review of the decision reported in 92 Ohio St. 517, 112 N.E. 1085. The Ohio decision was a memorandum decision without an opinion, but cited as authority Benner v. Benner, 63 Ohio St. 220, 58 N.E. 569. As to the divorce action of Pennington v. Pennington (not reported and in which action the injunction in rem was issued) we are not advised whether the notice to the non-resident husband gave notice of the proposed appropriation of his property, as required in Pennoyer v. Neff, supra. However, we assume that the Ohio law required such notice and that its law was complied with, by reason of the following language in Benner v. Benner, supra:

> '* * * The judgment rendered was made operative only on the property so brought within the control of the court at the beginning of the suit,

and is not, in our opinion, void for want of jurisdiction. In Wesner v. O'Brien, 56 Kan. 724, 44 P. 1090 [32 L.R.A. 289], the court went further, and sustained a judgment, rendered on constructive service, which appropriated land in that state, of a non-resident defendant, for his wife's alimony, though the land was not situated in the county where the suit was brought, and no step was taken to bring the property within the control of the court, otherwise than by the commencement of the suit and publication of the notice. The court said that the "seizure of the land in such a case is little more than a form. The essential matter is that the defendant shall have legal notice of the proposed appropriation, and this is afforded by the publication notice, which *warns the defendant that one of the purposes of the proceeding is the sequestration of the land.*" * * *' [Emphasis added]

Forrester v. Forrester, 155 Ga. 722, 118 S.E. 373, 29 A.L.R. 1363, was an action for permanent alimony and attorney's fees against a non-resident defendant, over whom the court did not obtain personal jurisdiction. The case held that the lower court, by reason of its general jurisdiction in equity, could appropriate a debt owing to the non-resident husband when the debtor was made a defendant in the action and was personally served with process, stating:

'* * * At common law as well as the statute of this state, a husband is bound to maintain and support his wife. Whatever sum may be necessary for that purpose is a demand which, when liquidated by the court by a judgment fixing its amount in such sum as may appear to the court to be just and adequate, is called alimony. Her husband, the debtor, after abandoning her, takes up his residence in the state of Alabama. A citizen of this state, who resides in Worth County, owes the non-resident a debt of $600, besides interest. Is the

plaintiff in such a case remediless to enforce her legal demand for support, merely because this demand is for support, otherwise called alimony, instead of being a claim of some other nature? If the plaintiff in the present case, instead of being the wife of her non-resident debtor, were any other person to whom he was indebted, could she not enforce her demand by an attachment based upon non-residence and perfect service by summons of garnishment upon the debtor of the non-resident? We apprehend that there can be but one answer to this question.

'Aside from the fact that the demand for alimony cannot be enforced by attachment and garnishment, because this is a proceeding in law, is the fact that a demand for alimony is unliquidated and must remain unliquidated until fixed by a decree of the court, and this itself would absolutely preclude the plaintiff in the suit for alimony against a non-resident from proceeding by attachment. At law this plaintiff is remediless; and, in such a case, and whenever and wherever the law by reason of its universality is impotent to succor one who has a right, equity supplies the needful remedy. Whether the use of the term "equitable attachment" be appropriate or not, it is our opinion that equity, by a proceeding in rem and the seizure and appropriation of the res, can condemn all or so much of the res as is necessary for that purpose to the just demands of a citizen of this state, when the res, the property of the non-resident, is located in this state. It is true that our laws have no extraterritorial effect, and it may be true that in a particular case personal service cannot be perfected other than by publication; but the courts here still have jurisdiction of the subject-matter of the suit and of the res, and can apply the one to the other by a judgment in rem, as suggested by Chief Justice Fish in Hood v. Hood, 130 Ga. 610, 61 S.E. 471, 19 L.R.A. (N.S.) 193, 14 Ann. Cas. 359. * * *'

Reed v. Reed, 121 Ohio St. 188, 167 N.E. 684, 64 A.L.R. 1384, was an action for divorce and seeking the appropriation of defendant's interest in land [held by the husband and wife jointly] to satisfy alimony. The husband was a non-resident, over whom the court did not obtain personal jurisdiction. The court held that since the petition and the published notice to the defendant-husband contained a particular description of the land sought to be appropriated, that the proceedings were equal to a sequestration of the land:

> '* * * We think the first proposition is decided in favor of the plaintiff by the case of Wesner v. O'Brien, supra, cited and relied upon by this court in the Benner case. In that controversy, the contention was squarely made that the property in question had not been brought within the control of the court by attachment or any similar proceeding. The court held that, where a petition asks to have specific land appropriated as alimony and the publication notice contains a particular description of the land sought to be appropriated and the nature of the relief demanded, this constitutes a sequestration of the property and gives the court jurisdiction to dispose thereof upon final decree. The court points out that it is not necessary, in order to bring the property under control of the court, that it should be actually taken in attachment or by other writ, and states that any authorized act by which the court takes charge of property or asserts its control over it is sufficient for purposes of jurisdiction.' * * *

Geary v. Geary, 272 N.Y. 390, 6 N.E.2d 67, 108 A.L.R. 1293, was an action for separation and alimony against a non-resident husband, over whom the court did not obtain personal jurisdiction. The lower court appointed a receiver for the husband's property. The receiver was ordered to pay for the support of the wife. The opinion states:

"* * * Without service of process within the state or voluntary appearance in court or submission to its jurisdiction, no court of a state acquires jurisdiction of the person of a non-resident defendant or can grant a personal judgment enforceable by execution against his person or property. Though a state has power to provide that the property of a non-resident within the state may be applied to satisfy the obligation of a non-resident, it may do so only where the action is directed against property which the court has taken into its custody or possession and where the defendant who owns the property has actual or constructive notice of the action and has opportunity to defend. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565.

* * * * * *

'In this case, though the defendant was served personally in California under a valid order of the court, and failed to appear or plead in the action, the judgment which could be granted upon default could not include an effective award of alimony payable out of sequestrated property of the defendant which had not previously been seized. "The right to dispose of it rests upon a prior seizure. Only so does the defendant receive notice that he has rights which should be protected. It must, therefore, appear *before a judgment* is entered purporting to deal with a non-resident's property, that by attachment, by injunction, by sequestration, in some manner, the court has laid hands upon his property within the State." (Italics are mine.) Matthews v. Matthews (second appeal), 247 N.Y. 32, 34, 159 N.E. 713, 714, per Andrews, J.

* * * * * *

'The jurisdiction of the court over the *marital status* of the parties did not depend upon the sequestration or seizure of the defendant's property. It had such jurisdiction before. That jurisdiction did not, however, extend further to the disposition of

any property which might be thereafter seized. That can rest only upon prior seizure. We are not here concerned with the validity of any orders for alimony pendente lite. The order which we are reviewing applies only to alimony granted by the judgment. Since the judgment was granted after seizure in this case, and since the defendant had notice that his property was seized and would be applied in satisfaction of any award of alimony made against him, and since the defendant had opportunity to contest the right to seizure of his property and to its application upon any judgment that might be entered, and chose to disregard the notice, he should not be heard to complain that his property had been taken without due process of law. The rule, if there be such rule, that seizure must precede *assumption of jurisdiction* by the court in the action, applies only to assumption of jurisdiction to adjudicate in the action upon rights in the defendant's property. The New York statute in terms permits the making of a sequestration order in a pending action. The Constitution of the State of New York and the Constitution of the United States are not violated by such provision so long as under the New York statute seizure must precede inquiry or adjudication as to the award of alimony, or the application of property of the defendant to payment of such award so that the defendant may have opportunity to be heard upon that inquiry. The defendant has had such opportunity here.' [Emphasis by the court]"

The petitioner contends that *Webb* v. *Webb*, supra, is in conflict with this Court's decision in *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565. *Pennoyer* v. *Neff*, supra, was a case brought in Oregon to recover possession of a tract of land in Oregon that had been sold to Neff upon execution sale by the Sheriff pursuant to a judgment that had been rendered against Pennoyer. The judgment against Pennoyer was entered in a common law action in which

Pennoyer had not been personally served and did not personally appear. No property was attached or proceeded against until after rendition of the judgment. This Court held that judgment void and set aside the sale. Mr. Justice Field, writing the opinion for the Court, made it extremely clear that where one of the objects of the action was to proceed against a particular piece of property and to reach and apply an interest in that property, the state had the power to do so on the predicate of constructive service of process. Pertinent excerpts from the opinion read thusly:

(95 U.S. at 727)

"Substituted services by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. . . ."

(95 U.S. at 730-731)

"* * * In all the cases brought in the State and Federal Courts, where attempts have been made, under the Act of Congress, to give effect in one State to personal judgments rendered in another State against non-residents, without service upon them, or upon substituted service by publication, or in some other form,

> it has been held, without an exception so far as we are aware, that such judgments were without any binding force, except as to property or interests in property within the State, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding in rem, and as having no operation beyond the disposition of the property, or some interest therein. . . ."

Supporting that view, Mr. Justice Field quoted from an earlier United States Supreme Court decision by Mr. Justice McLean, as follows (95 U.S. at 724):

> "Jurisdiction is acquired in one of two modes; first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."

Mr. Justice Field, in concluding his decision in *Pennoyer* v. *Neff*, supra, takes great pains to point out that the opinion is not to be misconstrued as a curtailment of the power of the several states to proceed upon the foundation of constructive service of process, in matters effecting the status of residents, and the disposition of property within the borders of the state. He limited the application of the opinion as follows (95 U.S. at 736):

> "* * * The question here respects only the validity of a money judgment rendered in one State, in an

action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein."

Subsequent to the decision of *Pennoyer* v. *Neff*, supra, the United States Supreme Court, through Mr. Justice Brandeis, in *Pennington* v. *Fourth National Bank of Cincinnati, Ohio*, 243 U.S. 269, 37 S. Ct. 282, 283, held:

> "It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. *It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt—that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized. Cases are cited in the margin.
>
> The objection that this proceeding was void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction

which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which cannot be attached at law. . . ."

Reading the Pennoyer, Pennington and Webb cases together establishes that in marital litigation a wife may proceed against her husband's property within the state in order to subject it to the satisfaction of such alimony, child support, attorney's fees and suit money as the divorce court may ultimately grant. The proceeding against the property is in rem and the divorce court's jurisdiction extends solely to the limit of the property within the state. The power of the Court is based upon its seizure of the property by lawful process prior to the rendition of the decree for alimony, child support, attorney's fees and suit money. A notice of suit duly issued specifically describing the nonresident husband's property within the state as property proceeded against and sought to be subjected to the lien of the decree to be rendered in favor of the wife and children constitutes a seizure and makes the proceeding one in rem against such duly described property. In this case all of the essentials were complied with. Mrs. Morton and her children duly notified Richard Morton on September 21, 1962, that his title and ownership in the Morton Towers property in Dade County, Florida, and in the marital residence in Sarasota County, Florida, were being proceeded against in order to be subjected to the claims for alimony, child support, attorney's fees and suit money. That seizure took place long before the entry of the final decree rendered on September 9, 1963, imposing an equitable lien upon Richard Morton's eight (8%) percent title and ownership in the Morton Towers property for the satisfaction of the decreed alimony, child support, attorney's fees and suit money. Richard Morton had actual

notice and had an opportunity to defend. As the above cited law required, Richard Morton should have come forth and established such defences as he deemed he had. Richard Morton never utilized the opportunity afforded him to contest the Sarasota Circuit Court's jurisdiction either in that Court or on appeal. Instead, Richard Morton chose to utilize the opportunity to defend as an opportunity to defraud. He did not ignore the Florida divorce proceedings. Upon actual notice he, in conjunction with his dynastic family, galvanized themselves into action in an attempt to destroy the Sarasota Circuit Court's jurisdiction over his property and in that way hoped to prevent the Courts of Florida from providing for its citizens. As established by the cited cases, the Sarasota Circuit Court undeniably had jurisdiction to the extent of Richard Morton's property in Florida. If Richard Morton and his family could convert that property in Florida into a different form of property with existence outside of Florida, then the goal of destroying the Sarasota Circuit Court's jurisdiction might have been accomplished. The clever method selected was to convert Richard Morton's title and ownership in the Morton Towers real property in Florida into an ownership of intangible property in the form of corporate stock in a foreign corporation, with its situs beyond the reach of the Florida judiciary. That is precisely why Wheatland Hills Corp. was created as a Delaware corporation and the stock certificates retained by Lawrence Morton in New York under a voting trust (Stipulated Exhibit C; R 319). Consequently, a seemingly naive argument that there is nothing wrong in converting Richard Morton's ownership of land in Florida to stock in a foreign corporation is spurious, because in that conversion lies the attempt at destruction of the Sarasota Circuit Court's jurisdiction. The Sarasota Circuit Court had jurisdiction of the land in Florida but it did not have and could not acquire jurisdiction

over the stock of a Delaware corporation physically located in New York. The due process concepts espoused by this Court were patently meant to protect persons from having their property taken without notice and without a chance to present their case. Those concepts were never intended to grant sanctuary to a person who knows of the proceeding and who has a chance to defend but who prefers to perpetrate a fraud and accomplish the impoverishment of his wife and children. Clearly Richard Morton's constitutional right to due process of law was fully honored.

B) Wheatland Hills Corp. Cannot Assert the Alleged Violation of Richard Morton's Constitutional Right to Due Process of Law; and

C) The Decision of the Alleged Constitutional Issue Is Not Necessary and Unavoidable to a Determination of the Rights of the Parties to This Litigation.

These two issues shall be presented together because they are inseparably interrelated. Traditionally established practice in the United States Supreme Court precludes consideration of constitutional questions raised by a litigant for someone else and where a determination of the constitutional question is avoidable. See as exemplary *Blair* v. *United States,* 250 U.S. 273, 39 S. Ct. 468; *Voelier* v. *Neilston Warehouse Co.,* 311 U.S. 531, 61 S. Ct. 376; and *Neese* v. *Southern Railway Company,* 350 U.S. 77, 76 S. Ct. 131. In Blair it was held:

> "Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it."

Similarly, in Voeller, the following was stated:

> "The constitutional issue is here raised for the majority shareholders by the corporation, which admittedly itself had notice. Exercising the very delicate responsibility of passing upon the validity of state statutes, this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions."

In Neese, this Court held:

> ". . . we follow the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties."

In this case the petitioner, Wheatland Hills Corp., is asserting as a constitutional question an alleged violation of Richard Morton's right to due process of law. It is apparent the corporate instrumentality asserting the issue does not have standing.

Under settled law in Florida a collateral attack upon a final decree of divorce is permitted only by the immediate parties to the litigation upon the grounds of extrinsic fraud. In other words once the appeal period has expired, a final decree becomes unassailable except for matters that are extrinsic to the original litigation and which could not have been litigated in the original proceeding. See as exemplary: *Mabson* v. *Mabson*, 104 Fla. 162, 140 So. 801; *Matsis* v. *Matsis*, 155 Fla. 786, 21 So. 2d 545; *Masilotti* v. *Masilotti*, 158 Fla. 663, 29 So. 2d 872; and *MacFadden* v. *Muckerman*, 116 So. 2d 448, Fla. App. 3rd, 1959. Furthermore, it is settled as a matter of Florida law that strangers to a final decree can seek to impeach it only as such decree affects their rights which they pos-

sessed prior to its rendition. See *DeMarigny* v. *DeMarigny*, 43 So. 2d 442 (Fla. 1949); *Gaylord* v. *Gaylord*, 45 So. 2d 507 (Fla. 1950); and *Tallentire* v. *Burkhart*, 153 Fla. 278, 14 So. 2d 395. In the last cited case, Mrs. Burkhart sought to enforce a quasi in rem alimony decree against property that she claimed belonged to her absent husband. Those against whom Mrs. Burkhart sought to enforce her final decree contended that the final decree in the main proceeding should be set aside on the ground of want of jurisdiction over the person of the defendant, the same contention made by Wheatland Hills in this case. The Florida Supreme Court held that those strangers to the final decree in the main proceeding had limited standing solely to resist the attempt to enforce the decree against their property but not otherwise because the decree in no way injuriously affected them. That simply means that all that strangers to the decree could do was demonstrate that they in fact were bona fide owners of the property Mrs. Burkhart sought to have subjected to the satisfaction of her final decree against Mr. Burkhart. Obviously if they were bona fide owners of the property, Mrs. Burkhart could not take a stranger's property in satisfaction of her husband's debt. The pertinent language of that holding reads as follows (14 So. 2d at 397):

> "The petitioners are strangers to the main suit. They were originally allowed to come in as intervenors after final decree, only because by subsequent motion in the cause Mrs. Burkhart sought to impound certain property claimed by them to the satisfaction of the judgment against her former husband. To the extent that it was necessary for them to be given an opportunity to defend such rights as they had against the threatened action of Mrs. Burkhart, they had sufficient standing in court to entitle them to resist any attempt upon her part to enforce the judgment

against their property. Tallentire v. Burkhart, supra; Freeman on Judgments, 5th Ed., Sec. 310, p. 623. But otherwise, they cannot be heard to question the decree rendered in the main proceeding (as they now are attempting to do) because it cannot be said that they are injuriously affected thereby."

Similarly, in the case at bar, Wheatland Hills Corp., a Delaware corporation, is a stranger to the Sarasota divorce proceeding although not an innocent party without full notice and knowledge of that proceeding. Its standing is strictly limited by state law to demonstrate, if it could, which of course it could not and did not, that it was a bona fide purchaser of the Morton Towers property without either constructive or actual knowledge of the Sarasota divorce proceeding. It was in no position to collaterally attack the jurisdiction of the Sarasota Circuit Court in the Dade County Circuit Court on the ground of lack of personal jurisdiction over Richard Morton. Richard Morton could not make that attack since he had actual notice and declined the opportunity to defend that was afforded to him, and the final decree has passed into repose by the elapse of the appeal period. The Gaylord case, supra, is significant because it establishes the doctrine of quasi estoppel in collateral attacks on final decrees by strangers who have actual knowledge of the pendency of the proceeding leading up to the rendition of the challenged decree. The Florida Supreme Court adopted the quasi estoppel doctrine as a part of Florida law, because to permit strangers having actual knowledge of the pendency of litigation to collaterally attack the resulting decree would be an invitation to flagrant attempts to circumvent the law. The pertinent language of the Gaylord decision reads as follows (45 So. 2d 509):

"It is true that the respondent was not actually a party to the alleged invalid divorce. Consequently,

> he was, in the strict legal signification of the word, a 'stranger'. However, he was not a stranger in the sense that he was ignorant of or unfamiliar with the Alabama divorce suit for he was appointed Commissioner by the Alabama court and acted as such in the State of New York in taking the deposition of the plaintiff (petitioner here) which fact, although it may not create a true estoppel, gives birth to a 'quasi estoppel' and is a circumstance which cannot be entirely ignored. Our decision in the instant suit is not founded upon this incident but we do approve the pertinent observation which was made in Harlan v. Harlan, 1945, 70 Cal. App. 2d 657, 161 P. 2d 490: 'To hold otherwise protects neither the welfare nor morals of society but, on the contrary, such holding is a flagrant invitation to others to attempt to circumvent the law,' . . ."

The "quasi estoppel" doctrine thus established in Gaylord, supra, is poignantly applicable to this litigation. Wheatland Hills Corp., a Delaware corporation, is a stranger to the Sarasota Circuit Court final decree of divorce between the Mortons, but as in Gaylord it was not a stranger in the sense that it was ignorant of or unfamiliar with the Sarasota divorce proceedings. It acquired its interest in the Morton Towers property not only in the light of the Sarasota Circuit Court divorce proceedings but as Mr. Newman (one of the older generation in the Morton dynasty) testified for the avowed purpose of trying to thwart that Court's jurisdiction. Wheatland Hills Corp. came before a court of equity with dirty hands indeed and lacked standing and was barred from making the collateral attack (unmeritorious though it may be) that it presented. Additionally, under established state law, Wheatland Hills was not a bona fide purchaser. The indicia or badges of fraud in Florida are clearly codified in 15 Fla. Jur., *Fraudulent Conveyances*, Section 12, at pages 43-44, as follows:

> "* * * The facts that are recognized indicia of fraud are numerous, the most important being the insolvency or indebtedness of the transferor, the transfer of the debtor's entire estate, relationship between the transferor and the transferee, lack of consideration for the conveyance, retention by the debtor of possession of property transferred accompanied with the exercise of unequivocal acts of ownership over it, the reservation of benefit to the transferor, and the pendency or threat of litigation. Other recognized indicia of fraud include * * * the withholding of a deed of transfer from the record for a period of time, the transfer of the debtor's assets to a corporation owned or controlled by him, . . ."

The decided cases in this area are legion but some of special significance shall be considered. In *Bloxham* v. *Florida Cent. & P. R. Co.*, 35 Fla. 625, 17 So. 902, and *J. I. Kelley Co.* v. *Pollack & Bernheimer*, 57 Fla. 459, 49 So. 934, the Florida Supreme Court held that real property transferred to a newly formed corporation, in exchange for corporate stock, remains subject to existing debts and equitable claims and that such corporation is not an innocent purchaser. In *Bloxham*, supra, at a time when ad valorem taxes in Florida did not constitute a lien against real property but were merely a simple debt, the owners of property subject to delinquent taxes formed corporations and transferred their property to it in exchange for the corporation's stock. Just exactly what RICHARD MORTON did in exchanging his title and ownership in the MORTON TOWERS property for stock in WHEATLAND HILLS CORP. The Florida Supreme Court condemned that type of transaction as non bona fide in these words. (17 So. at 922):

> "* * * Therefore the inquiry arises whether the Florida Railway & Navigation Company was such innocent purchaser as we have hereinbefore stated could hold

the property as against the state's claim for taxes. The only changes which had occurred in the ownership of the property between the time of its acquisition by Reed and his associates in September, 1879, and its assessment for taxation, were by a sale by the persons organizing a corporation to the corporation composed of themselves, and by a consolidation of the corporation owning it into another corporation, of which it remained a constituent part until the assessments were made. It would be defeating the state of its taxes upon the merest technicality to hold that such transfers of the property as these constituted an innocent purchaser, as the transferees, Reed and his associates, came into the ownership of the property in September, 1879. At this date the time, under the then existing laws, had not expired when the state might assess and collect the taxes from the property. Laws 1879, pp. 30, 31, c. 3099, §§ 45, 46. They took the property when it was liable to taxation for 1879, and held it while it became and was liable for the taxes of 1880 and 1881. These taxes, while not liens upon the property, were obligations due by the owners, and for which the property might be made liable. Can this obligation and liability be discharged by the transfer of the property by the owners as individuals to themselves in a corporate capacity? We think not. Such transfers are more nominal than real. In the case of Railroad Co. v. Drew, 3 Woods, 691, text 701, Fed.Cas. No. 17,434, a question somewhat similar arose, in which it was determined that, where persons holding as individuals railroad property subject to a lien passed the title to a corporation composed of themselves clothed with corporate power, the lien was not thereby divested. 1 Mor. Priv. Corp., § 229, thus states the same principle: 'If an association of persons owning property subject to equitable claims obtains an act of incorporation, the property will remain subject to these claims after it is vested in the corporate name. * * *' To similar effect, also, is Beach, Priv. Corp. § 797. We have not been able to find a case where the precise

question herein involved (i.e. the liability for taxes of property transferred by an association of persons to themselves as a corporation) has been adjudicated. We find a number of cases where it has been held that such a transfer would not relieve the property of liability for an indebtedness contracted by the association which afterwards became a corporation. The case of Hancock v. Holbrook, 40 La.Ann. 53, 3 South. 351, was a case where the stockholders of a corporation, through the medium of an individual who was not a stockholder, bought property at a judicial sale in the name of the corporation, and immediately conveyed the same to a new corporation, composed of the same stockholders and the individual through whom the property was purchased. The court (text, page 61, 40 La.Ann., page 351, 3 South.), speaking upon the contention that the property in the hands of the new corporation was not liable for the debts of the company, says: 'The new corporation was simply the Herald Company plus Holbrook, as evidenced by the glaring fact that its stock, except that assigned to Holbrook, was distributed without other consideration among the Herald stockholders in exact proportion to their stock therein. The proposition that the stockholders of a corporation can buy property in its name on credit, immediately thereafter form a new corporation, in which their interests are the same, and based on no new consideration, transfer the property bought to the new corporation, and then hold it free from any liability to the vendor or creditors, is one which cannot be sustained in reason or by authority.' . . ."

In *Frell* v. *Frell,* 154 So. 2d 706 (Fla.App.3rd, 1963), a conveyance to a defendant-husband's brother and his wife to hinder, delay and defeat the plaintiff-wife's right to collect alimony was set aside as a fraud. The court held (154 So. 2d at 708-709):

"* * * However, where the parties involved in the alleged fraudulent transaction are relatives or close associates of the transferor, such close relationship

> tends to establish a prima facie case which must be met by evidence on the part of the defendant, and such transactions are regarded with suspicion. Southern Lumber & Supply Co. v. Verdier, 1906, 51 Fla. 570, 40 So. 676; Reel v. Livingston, 1894, 34 Fla. 377, 16 So. 284; Harkins v. Holt, 1936, 124 Fla. 774, 169 So. 481."

Regarding burden of proof, it has been long settled that the existence of a badge of fraud casts the burden of proof to explain the transaction upon the transferee. In *Money* v. *Powell*, 139 So. 2d 702, 703-704 (Fla.App.2nd, 1962), it was held:

> "Moreover, where the transferee in an alleged fraudulent transaction is a relative or close associate of the transferor, such tends to establish a prima facie case which must be met by evidence on the part of the defendant. Tornwall v. Carter, supra; Southern Lumber & Supply Co. v. Verdier, 1906, 51 Fla. 570, 40 So. 676; Harkins v. Holt, 1936, 124 Fla. 774, 169 So. 481."

Similarly, in *Folsom* v. *Farmers Bank of Vero Beach*, 102 Fla. 899, 136 So. 524, 527, the Florida Supreme Court held:

> "The general rule is that a deed with a consideration merely nominal will be considered voluntary as against attacking creditors. * * *
>
> "Voluntary conveyances by debtors of their real estate are not absolutely fraudulent per se, but are prima facie or presumptive evidence of fraud, which may be rebutted or explained; and the burden of proof to show that the deed was not fraudulent falls upon those claiming under it."

In this case, almost every badge of fraud exists. RICHARD MORTON, at the time of the purported conveyance to WHEATLAND HILLS CORP., was indebted to his wife and children for alimony, child support, attorneys' fees and court costs. He and his family were on notice of the di-

vorce proceeding and that one of its objects was to appropriate his interest in the MORTON TOWERS property to the satisfaction of the stated debts. WHEATLAND HILLS CORP. was not an innocent purchaser for value by the exchange of stock for title to real estate. RICHARD MORTON retained all of the benefits of ownership, exemplary of which is the increase of his personal loan at THE CHASE MANHATTAN BANK and the application thereafter of the rents and profits from the MORTON TOWERS property to pay that debt as if WHEATLAND HILLS CORP. did not exist. Possession remained as it always had been, in EMIL MORTON, the uncle of RICHARD MORTON. In fact, nothing was altered by the attempt to change the form of ownership. As the cited authorities establish, the conveyance to WHEATLAND HILLS CORP. was a fraud, which, in equity, had to be disregarded as though it never occurred. WHEATLAND HILLS CORP. failed to even attempt to meet its burden of proof by explaining away the established presumptive fraud.

It is readily apparent that Wheatland Hills has no standing before this Court to assert an alleged violation of Richard Morton's right to due process of law. As demonstrated in the preceding section of this brief, Richard Morton was not denied due process of law. The constitutional question attempted to be asserted by Wheatland Hills was not unavoidable and was not necessary for a determination of the rights of the parties to this litigation. Pursuant to state law, a collateral attack is limited to a demonstration of extrinsic fraud in the procurement of the assailed decree. The record is utterly devoid of any such proof. Moreover, Wheatland Hills as a stranger to the decree was both precluded and estopped by state law from making the attack that it sought to present. It was precluded from challenging the original divorce proceeding

and it was not a bona fide owner of property seeking to protect its rights. It was estopped by its guilty knowledge of the original proceeding and its fraudulent activity. Under the customary and established practice of this Court, Wheatland Hills ought not be permitted to proceed further and its petition for a writ of certiorari should be denied.

D) The United States Supreme Court Does Not Have Jurisdiction Because the Petition for a Writ of Certiorari Was Filed Out of Season and Was Untimely by Virtue of the Elapse of 204 Days Between the Date of the Finality of the Decision Sought to Be Reviewed and the Filing of the Petition in This Cause.

The petitioner has invoked the jurisdiction of this Court allegedly under the auspices of 28 U.S.C., Section 1257(3). That jurisdictional statute permits the United States Supreme Court to review final judgments or decrees rendered "by the highest court of a state in which a decision could be had." The time for applying for a writ of certiorari in this Court from a final judgment or decree of a state court is prescribed by Congress in 28 U.S.C., Section 2101(c). It is provided that the writ shall be "applied for within 90 days after the entry of such judgment or decree." That section also provides that a Justice of the Supreme Court for good cause may extend the time for a period not exceeding 60 days. Supreme Court Rule 34(2) expressly declares that extensions of time to file petitions for certiorari must be submitted at least 10 days prior to the expiration of the period sought to be extended and will only be granted in extraordinary circumstances if filed during the last 10 days of such period. It is apparent that in promulgating the cited rule, this Court declared the policy that the 90 day allowable period for the timely presentation of petitions for certiorari will be scrupulously observed. Moreover, Congress, in the cited Act, provided that petitions for certiorari could under no circumstances

be filed more than 150 days after the rendition of the final judgment or decree of a state court.

In the instant case the petition for certiorari was filed on January 3, 1968. The decision of the District Court of Appeal, Third District of Florida, sought to be reviewed was rendered and became final on June 13, 1967. The reason that date marks the finality of the decision sought to be reviewed is because that was the day that the District Court of Appeal denied petition for rehearing and its mandate issued (R 439). Rendition is defined by Florida Appellate Rule 1.3 (Appendix, p. A1). The intervening period between the finality of the decision sought to be reviewed and the filing of the petition for certiorari in this Court was 204 days. Under no circumstances could that period be considered seasonable even if applications had been duly made to this Court for extensions of time.

During the stated intervening period, the petitioner in this cause did attempt to invoke the jurisdiction of the Florida Supreme Court; however, that Court did not have jurisdiction to review this case. The jurisdictional power of the Florida Supreme Court is defined in Article V, Section 4(2) of the Constitution of the State of Florida. The decision sought to be reviewed (R 438) patently on its face does not come within any of the categories in which the Florida Supreme Court might conceivably have jurisdiction. The petitioner sought a writ of certiorari in the Florida Supreme Court (R 440-450) upon the "direct conflict" theory that the decision sought to be reviewed clashed with prior precedent. The Florida Supreme Court, in denying the writ, established that the allegation of direct conflict was unfounded. Even a casual reading of the jurisdictional provision of the Florida Constitution pertaining to the Florida Supreme Court reveals that a direct conflict must actually exist between the decision sought to be reviewed and a prior decision of either the Supreme Court or sister

district court. In this case the decision of the District Court of Appeal recites on its face a prior decision of the Florida Supreme Court and two prior decisions of the same District Court as authority for the decision. Clearly the decision is not in conflict as required by the Florida Constitution to vest jurisdiction in the Florida Supreme Court. Actually the petition for certiorari filed in the United States Supreme Court eliminates even the vaguest possibility that the petitioner sought to invoke the jurisdiction of the Florida Supreme Court in a good faith attempt to exhaust state remedies. On page 11 of the petition for certiorari it is stated that "the present case marks the addition of the State of Florida to those jurisdictions that steadfastly and consistently refuse to adhere to the constitutional principles enunciated by this Court." That statement must mean that the petitioner considered this case novel to the jurisprudence of the State of Florida. That being the case, it is impossible for the petitioner to have labored under the belief that the Florida Supreme Court had jurisdiction based on a "direct conflict", as a matter of law with any prior decision of a sister district court or the Florida Supreme Court.

The Florida Supreme Court in *Lake* v. *Lake*, 103 So. 2d 639 (1958 Fla.) shortly after the District Courts of Appeal were created on July 1, 1957, put the bar, the bench and the public in the State of Florida on absolute notice that the District Courts of Appeal were courts of final appellate jurisdiction. After outlining the background that led to the constitutional establishment of the District Courts of Appeal, the Florida Supreme Court held as follows (103 So. 2d at 641-642):

> "To meet these objections, which were plainly well-founded, it was the judgment of those who struggled with the problem that the formation of district courts of appeal could be conscientiously recommended

to the people if the *powers* and *jurisdiction* of the Supreme Court were so defined and confined that there would be no danger of the district courts of appeal becoming way stations on the road to the Supreme Court.

They are and were meant to be courts of final, appellate jurisdiction."

(Emphasis is the Court's)

In the recent decision of *Nash* v. *Florida Industrial Commission*, ... U.S. ....., 88 S. Ct. 362, this Court recognized the limited jurisdiction of the Florida Supreme Court and recognized the District Court of Appeal as the highest court in Florida wherein a decision could be had as required by 28 U.S.C., Section 1257(3).

It is undeniable in this case that the decision of the District Court of Appeal, Third District of Florida, sought to be reviewed by the petition for certiorari filed in this cause was rendered by the highest court in Florida in which a decision could be had. That decision became final on June 13, 1967. The petition for certiorari filed in this Court 204 days thereafter is untimely and out of season and for that reason this Court does not have jurisdiction of this case.

CONCLUSION

Based on the foregoing reasons, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

.....

MARION E. SIBLEY

.....

IRVING B. LEVENSON
Attorneys for Respondent
605 Lincoln Road
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari was furnished to the following:

A) EUGENE GRESSMAN
Attorney for Petitioner
1730 K Street, N.W.
Washington, D.C.

B) HARVEY J. ABEL
Attorney for Petitioner
2071 Main Street
Sarasota, Florida 33577

C) ALLAN MILLEDGE and
RICHARD L. HORN
Attorneys for Petitioner
150 S. E. Second Avenue
Miami, Florida 33131

D) THOMAS C. BRITTON
Attorney for the Sheriff of Dade County
County Attorney
Dade County Courthouse
Miami, Florida

E) MERSHON, SAWYER, JOHNSTON, DUNWODY & COLE
Attorneys for Chase Manhattan Bank
1600 First National Bank Building
Miami, Florida

by mail, by depositing the same in a United States mail box, with first class postage prepaid affixed, except in the case of Mr. Eugene Gressman, who, being a distance of more than 500 miles away, airmail postage prepaid was affixed, appropriately addressed, to counsel for the respective parties as specified in A)-E) above, on this the ..... day of February, 1968.

.....

IRVING B. LEVENSON